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No. 87-284

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF TEXAS, *Petitioner*

v.

RODNEY GENE BROADWAY, *Respondent*

On Writ of Certiorari to the Court of Criminal Appeals of Texas

Petitioner's Reply to Brief in Opposition

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Petitioner's Reply Brief

In his statement of the case and again in his fifth reason for denying the writ, respondent contends that his expert psychiatric witness, Dr. McCauley, did *not* recant his previous testimony about respondent's competency to stand trial. This was in response to petitioner's contention that Dr. McCauley first testified that respondent was not competent but on cross-examination said he was competent. Pet. at 6-7. Respondent's argument is that because Dr. McCauley's cross-examination testimony was in terms relevant to sanity rather than competency, he did not in fact retreat from his testimony on direct that respondent was not competent to stand trial.

What respondent overlooks is that Dr. McCauley's testimony on direct was also in terms relevant only to "sanity." He testified that respondent was "insane" at the time McCauley examined him, "the same" at the time of

the offense, and "the same" at the time of trial. App. 3. Dr. McCauley was then asked if "Broadway *knows* the difference between right and wrong," and he answered, "I don't think he *can apply* these standards to himself." App. 3-4. (Emphasis added.) After stating that he thought respondent was "mentally ill," Dr. McCauley was passed for cross-examination. App. 4.

Respondent should not be allowed to have it both ways. Either the competency issue was raised and recanted, or it was not raised at all and never recanted. Throughout McCauley's testimony he used terminology pertinent to the insanity defense rather than incompetency to stand trial. However, regardless of which way the Court reads McCauley's testimony – whether raising competency and recanting it or not raising it at all – respondent's competency was not at issue, and the absence of a separate hearing was harmless error.

Respondent's first two reasons for denying the writ are premised on his contention that state courts have final authority to decide federal due process issues as long as the remedy chosen by the state court meets or exceeds minimum due process requirements established by this Court. Thus, according to respondent, if the Texas Court of Criminal Appeals refuses to hold that error under *Pate v. Robinson*, 383 U.S. 375 (1966) can be harmless, and thereby grants a criminal defendant significantly greater relief than is constitutionally required by *Pate*, this Court should not review the state court holding.

Respondent's position is at odds with the Supremacy Clause and *Delaware v. Van Arsdall*, 106 S.Ct. 1431

(1986). In *Van Arsdall*, the Court made it clear that it is this Court which ultimately determines whether a particular federal constitutional error can be harmless. See, 106 S.Ct. at 1434-1435, n. 3. Compare the dissenting opinion of Mr. Justice Marshall, 106 S.Ct. at 1440-1441. It follows that a state court may not finally decide such an issue. Review should be granted so that respondent's contention to the contrary may be rejected.

Respondent makes a similar contention in his sixth reason for denying the writ. He declares that the state court should be free to order a new trial rather than a retrospective competency hearing once it is established that the competency hearing was not discrete. However, the Court of Criminal Appeals clearly concluded that a new trial was the *exclusive* remedy allowed by *Pate* and the Constitution. *Ex parte Locklin*, 583 S.W.2d 787 (Tex. Crim. App. 1979). The Texas court was therefore attempting to construe federal constitutional law; it was not merely exercising fact-based discretion. Review of the Texas court's decision is therefore proper.

Respondent's third reason for denying the writ is that a *Pate* violation should never be harmless error. However, in his argument he contends that it is the right not to be tried while incompetent that can never be harmless. That may well be so, but it is not the issue in this case. The true issue is whether one of the judicially-created procedural protections of that right is so significant that its deprivation can never be harmless error. Review should be granted to determine if the depriva-

tion of a separate competency hearing is in that small category of constitutional errors that can never be harmless. See, *Van Arsdall*, 106 S.Ct. at 1437.

Respectfully submitted,

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APPENDIX

EXCERPT OF DIRECT EXAMINATION OF DR. H. LEAKE McCAULEY, JR., BY HON. ARDELL YOUNG

Q. Now, Doctor, will you tell the jury, and describe in some detail if you will, please, just the type of examination that you made of young Broadway when you examined him?

A. Well, I conducted what we call a psychiatric evaluation of him. That just involves sitting down and talking to him and trying to get some idea of his past and his patterns of behavior and calling upon my fund of professional knowledge about people and so forth to try to the best of my ability to derive some idea of how I feel he is functioning and whether or not he is mentally sick and whether or not he is in need of treatment.

Q. Doctor, just generally speaking, could you tell the jury something of young Broadway's intellectual power or his intelligence? For instance, his IQ, what could you tell the jury about that?

A. Well, I think he is mentally defective.

Q. And why do you say, Doctor, that he is mentally defective?

A. Because based on my interview with him and the way in which he answered my questions and his basic fund of information about what is going on around him, this is my clinical opinion that he is mentally deficient. This is borne out by the psychological reports. It was corroborated, so to speak, by the psychological reports which were given to me.

Q. Did your examination of him disclose any information to you with regard to whether young Broadway had judg-

ment and whether he could exercise proper judgment in any situation?

A. I think he has a very serious lack of judgment.

Q. What about his ability to think abstractly?

A. It is markedly impaired.

Q. What significance, Doctor, is that to you as a psychiatrist, his ability or inability to think abstractly?

A. That means that he cannot properly appraise and assess realistic interpersonal relationships with which he is confronted. His intellectual ability is compromised to a point where he is not able to deal with interpersonal relations with other people in an appropriate way and especially when he is under a great amount of stress and strain and things of this sort.

Q. Did your examination disclose to you any information concerning whether he is a young man of great impulsive nature or whether he is not of an impulsive nature?

A. I think he is very impulsive because of his defective intellect and that he is unable to control his instincts and drives.

Q. Does that or not, Doctor, in your opinion, make him very easy to be led or suggested to?

A. Very definitely. Yes, very definitely. A strong personality would be able to suggest something to this individual, just as a father would tell his little child, let's go outside, and the child would go along.

Q. What about his ability to control his emotions?

A. Markedly impaired.

Q. Doctor, did you also get some of this boy's family and his family background?

A. I did.

Q. Doctor, assume that this boy's mother has been mentally ill and that she herself has been confined in a mental institution at least three times in her lifetime, would that in itself have any relevancy or suggest anything to you?

A. Yes. It would certainly be important enough to be considered.

Q. Doctor, based upon your examination of this young man and the information furnished to you by my co-counsel, Mr. McClane, did you form an opinion as to whether or not young Broadway was on the date of your examination, sane or insane?

A. Yes, I did.

Q. What is your opinion with respect to young Broadway on the date of your examination with regard to his sanity?

A. It is my opinion that he is psychiatrically ill and is insane, if we have to use that term.

Q. Doctor, based upon your examination, which was conducted in June of 1966, state what your opinion would be with regard to his mental condition, say on January 13, 1966, some five months before this?

A. It would be my professional opinion that it would be the same.

Q. And what is your professional opinion with regard to his condition right now on this day?

A. Well, of course, I have not seen him since June 14th but it would be my feeling that it would be the same as it was on that date.

Q. Now, Doctor, what is your professional opinion with regard to whether young Broadway knows the difference between right and wrong as applied to himself in his own individual conduct and behavior?

A. I don't think he can apply these standards to himself. I do not think that he can apply what is right and what is wrong to himself, nor does he know the nature and quality of his acts in relation to other people. I mean that as he sits there he knows that it is a table and that you are his lawyer and this is the judge and this and that, but he cannot apply these things to himself, I do not think.

Q. Is he in your opinion mentally ill?

A. Yes.

MR. YOUNG: That is all.